YEO ING KING v. MELAWANGI SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
ABDUL RAHMAN SEBLI JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: B-02(W)-160-01-2016]
5 SEPTEMBER 2016

CIVIL PROCEDURE: *Documents – Agreed bundle – Classification of bundle of documents – Defamation – Parties agreed to include statement alleged to be defamatory in Part A of bundle of documents – Whether suing party deemed to have agreed not only to authenticity of documents but also to truth of contents – Whether signified agreement to truth of statements – Whether suing party estopped from disputing truth of statements – Rules of Court 2012, O. 34 r. 2(d)*

TORT: *Defamation – Libel – Alleged defamatory statements contained in letters – Parties agreed to include letters in agreed bundle of documents – Whether suing party deemed to have agreed not only to authenticity of documents but also to truth of contents – Whether suing party estopped from disputing truth of statements*

The respondent ('the plaintiff') commenced an action for defamation against the appellant ('the defendant') at the High Court. The statements alleged to be defamatory of the plaintiff were contained in three letters which both parties agreed were to be included in Part A of the bundle of documents ('the BOD'). The three letters were subsequently admitted and marked as evidence without any reservation by the parties. Before the trial took place, the defendant raised the point that since the defamatory statements were included in Part A of the BOD, the plaintiff was deemed to have agreed to the truth of the statements and as such, had no right to cross-examine the contents of the documents. The Judicial Commissioner ('the JC') found the issue raised by the defendant latent, deliberate, malicious, insidious and should fail. After a full trial, the JC held the defendant liable and awarded RM5 million in general, exemplary and punitive damages to the plaintiff. Hence, the present appeal by the defendant against liability and quantum. The defendant relied on O. 34 r. 2(d) of the Rules of Court 2012 ('the ROC') and argued that having chosen to include the defamatory statements in Part A of the BOD, the plaintiff was estopped from disputing the truth of the statements. The defendant further contended that the JC's decision would cause chaos in litigation practice as litigants would not be able to ascertain the exact agreement on the documents in the agreed BOD. This would render the classification of documents into Parts A, B and C meaningless as it could always be given a different meaning by the court. The central issue that arose for the court's adjudication was whether, by including the three letters in Part A of the BOD, the plaintiff was deemed to have agreed not only as to the authenticity of the documents but also to the truth of the contents.

Held (allowing appeal on quantum; dismissing appeal on liability)
Per Abdul Rahman Sebli JCA (for the majority):

(1) It was clear that the defendant's complaint was essentially against the findings of fact made by the trial court. The JC was plainly right in finding liability to have been established against the defendant on the balance of probabilities. However, the award of RM5 million ordered by the High Court was set aside and substituted with a global sum of RM50,000. This amount would be more than sufficient compensation for the damage done to the plaintiff's reputation. (paras 65, 76 & 86)

(2) It is a misconception to think that for the documents in Part A, 'everything is agreed'. If the defendant relies on the truth of the statements placed in Parts A, B or C to avoid liability, he bears the legal burden of proving the truth of the statements. The truth could come from the plaintiff's own evidence. However, the mere fact that the documents containing the statements were placed in Part A of the BOD did not provide such proof unless agreed by the parties. The plaintiff's burden in such action was only to prove that the statements were made, published and defamatory of the plaintiff. Once these elements of tort are established, the burden shifts to the defendant to prove the truth of the statements or that they were made on an occasion of qualified privilege or were fair comments (paras 43, 59 & 60)

(3) The flaw in the defendant's argument was that it equated contents with truth. There is a difference between agreeing on the contents of a document and agreeing on the truth of the contents. Order 34 r. 2 of the ROC is not designed to be a trap for the unwary to fall into. It is designed to simplify the procedure in a civil trial and to expedite the disposal of cases. Whether the statements were defamatory and whether they were the truth were matters that the court had to decide. (paras 44 & 47)

(4) What O. 34 r. 2(d) of the ROC envisages is only agreement on the contents of the documents and not the truth of the contents, unless agreed by the parties. There was no such agreement between the plaintiff and the defendant during the pre-trial case management. Therefore, the agreement by the parties to place the documents in Part A of the BOD was only an agreement that the documents contained the impugned statements and not an agreement that the statements were true of the plaintiff. (para 45)

Per Hamid Sultan Abu Backer JCA (dissenting):

(1) Once a document is placed in Part A, the contents as well as the truth is deemed to be proved. If the parties agree to place a document in Part A, it means that the maker need not be called because the authenticity of the documents is not in dispute. If there is a dispute as to the contents and/or its truth, it has to be placed in Part B. Placing in Part C means that the authenticity, contents and its truth is not admitted and the maker of the document must be called and the contents

must be proved. Placing the three letters in Part A was fatal to the plaintiff's case and the JC ought to have dismissed the plaintiff's suit *in limine*. (paras 3, 9-11 & 21)

***Bahasa Malaysia** Headnotes*

Responden ('plaintif') memulakan tindakan berasaskan fitnah terhadap perayu ('defendan') di Mahkamah Tinggi. Pernyataan-pernyataan plaintif yang dikatakan memfitnah terkandung dalam tiga surat yang pihak-pihak setuju agar dikepilkan dalam Bahagian A ikatan dokumen ('ID'). Ketiga-tiga surat ini seterusnya diakui dan ditanda sebagai keterangan tanpa ragu-ragu oleh kedua-dua pihak. Sebelum perbicaraan bermula, defendan membangkitkan hujahan bahawa memandangkan pernyataan-pernyataan memfitnah dikepilkan dalam Bahagian A ID, plaintif dianggap bersetuju dengan kebenarannya dan dengan itu, tiada hak menyoal balas kandungan dokumen tersebut. Pesuruhjaya Kehakiman ('PK') memutuskan bahawa isu yang dibangkitkan oleh defendan adalah isu terpendam, tersembunyi, disengajakan, berniat jahat dan seharusnya gagal. Selepas perbicaraan penuh, PK memutuskan defendan bertanggungan dan mengawardkan plaintif RM5 juta sebagai ganti rugi am, teladan dan punitif. Oleh itu, timbul rayuan ini oleh defendan terhadap liabiliti dan kuantum. Defendan bersandar pada A. 34 k. 2(d) Kaedah-Kaedah Mahkamah 2012 ('KKM') dalam menghujahkan bahawa apabila memilih untuk mengepilkan pernyataan-pernyataan tersebut dalam Bahagian A ID, plaintif diestop daripada mempertikaikan kebenaran pernyataan-pernyataan tersebut. Defendan menghujahkan lagi bahawa keputusan PK akan menghuru-harakan amalan litigasi kerana pelitigasi tidak dapat memastikan persetujuan sebenar dokumen dalam ID yang disetujui. Ini juga mensia-siakan pengklasifikasian dokumen kepada Bahagian A, B dan C kerana tafsiran berbeza boleh diberi oleh mahkamah. Isu utama berbangkit bagi pertimbangan mahkamah adalah sama ada, dengan mengepilkan ketiga-tiga surat dalam Bahagian A ID, plaintif dianggap bersetuju bukan sahaja dengan ketulenan dokumen tetapi juga kebenaran kandungannya.

Diputuskan (membenarkan rayuan terhadap kuantum; menolak rayuan terhadap liabiliti)
Oleh Abdul Rahman Sebli HMR (keputusan majoriti):

(1) Jelas bahawa aduan defendan berasaskan dapatan fakta oleh mahkamah bicara. Pesuruhjaya Kehakiman betul dalam memutuskan bahawa liabiliti defendan dibuktikan atas imbangan kebarangkalian. Walau bagaimanapun, award RM5 juta oleh Mahkamah Tinggi diketepikan dan diganti dengan jumlah global sebanyak RM50,000. Jumlah ini satu pampasan yang lebih daripada cukup bagi kejejasan reputasi plaintif.

(2) Satu salah anggapan bahawa dokumen dalam Bahagian A, 'semuanya disetujui'. Jika defendan bersandar pada kebenaran pernyataan-pernyataan dalam Bahagian A, B atau C untuk mengelak liabiliti, dia memikul beban perundangan untuk membuktikan kebenaran

pernyataan-pernyataan tersebut. Kebenaran boleh timbul daripada keterangan plaintif sendiri. Walau bagaimanapun, sekadar fakta bahawa dokumen berisi pernyataan-pernyataan tersebut dikepil dalam Bahagian A ID tidak membuktikannya melainkan disetujui oleh kedua-dua pihak. Beban plaintif dalam tindakan sedemikian adalah membuktikan pernyataan-pernyataan dibuat, diterbitkan dan memfitnah plaintif. Apabila elemen-elemen tort ini dibuktikan, beban berpindah kepada defendan untuk membuktikan kebenaran pernyataan-pernyataan ini atau bahawa semuanya dibuat atas dasar perlindungan bersyarat atau adalah komen adil.

(3) Kecacatan dalam hujahan defendan adalah defendan menyamakan kandungan dengan kebenaran. Terdapat perbezaan antara bersetuju akan kandungan dokumen dengan bersetuju akan kebenaran kandungannya. Aturan 34 k. 2 KKM tidak dirangka untuk memerangkap si cuai. Aturan ini bertujuan memudahkan prosedur perbicaraan sivil dan mencepatkan pelupusan kes-kes. Sama ada pernyataan-pernyataan bersifat memfitnah atau sama ada kesemuanya benar adalah hal perkara untuk diputuskan oleh mahkamah.

(4) Aturan 34 k. 2(d) cuma membayangkan persetujuan tentang kandungan dokumen dan bukan kebenarannya, melainkan disetujui pihak-pihak. Tiada persetujuan antara plaintif dan defendan semasa pengurusan kes pra-bicara. Oleh itu, persetujuan pihak-pihak untuk mengepilkan dokumen dalam Bahagian A ID cuma persetujuan bahawa dokumen tersebut mengandungi pernyataan-pernyataan yang dipertikaikan dan bukan persetujuan bahawa pernyataan-pernyataan tentang plaintif benar.

Oleh Hamid Sultan Abu Backer HMR (menentang):

(1) Apabila satu-satu dokumen dikepilkan dalam Bahagian A, kandungan dan kebenarannya dianggap terbukti. Jika pihak-pihak bersetuju mengepilkan dokumen dalam Bahagian A, maksudnya pembuat dokumen tersebut tidak perlu dipanggil kerana ketulenannya tidak dipertikaikan. Jika kandungan dan/atau kebenarannya dipertikai, dokumen ini mesti dikepil dalam Bahagian B. Mengepilkan dokumen dalam Bahagian C bermakna ketulenan, kandungan dan kebenarannya tidak diakui dan pembuat dokumen mesti dipanggil dan kandungannya mesti dibuktikan. Mengepilkan tiga surat tersebut dalam Bahagian A menjejaskan kes plaintif dan PK seharusnya menolak guaman plaintif *in limine*.

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Arul Chandran v. Chew Chin Aik Victor JP 2000 SGHC 111 ***(refd)***

Bett v. Lawess [1882] 51 LJQB ***(refd)***

Borneo Co (M) Sdn Bhd v. Penang Port Commission [1975] 1 LNS 5 FC ***(refd)***

Chong Khee Sang v. Pang Ah Chee [1983] 1 LNS 57 HC ***(refd)***

Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***
Chua Gek Kuon v. Seow Chai Seng [1991] 1 SLR(R) 614 ***(refd)***
Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560 CA ***(refd)***
Goh Ya Tian v. Tan Song Gou & Ors [1981] 1 LNS 39 HC ***(refd)***
Henry Trading Co Ltd v. Harun [1966] 1 LNS 65 HC ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
Jet Holding Ltd v. Cooper Cameron (Singapore) Pte Ltd [2006] 3 SLR(R) 769 ***(refd)***
Korea Natural Energy Corp v. Export-Import Bank of Malaysia Berhad [2014] 1 LNS 186 HC ***(refd)***
Lionel Edwards Ltd v. State of West Bengal AIR [1967] Cal 191 ***(refd)***
Mak Khuin Weng v. Melawangi Sdn Bhd (B-02-2191-12/2014) (Unreported) ***(refd)***
Mohd Nazari Ab Majit v. Tan Keo Hock & Anor [1999] 1 CLJ 601 HC ***(refd)***
Ng Bee Lian v. Fernandez [1994] 2 SLR(R) 179 ***(refd)***
Powell and Wife v. Streatham Manor Nursing Home [1935] AC 243 ***(refd)***
Press Automation Technology Pte Ltd v. Trans-Link Exhibition Forwarding Pte Ltd [2003] 1 SLR (R) 712 ***(refd)***
Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***
Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor [2008] 10 CLJ 491 HC ***(refd)***
Red and Yellow Omnibus Co Sdn Bhd & Anor v. Chuah Lay Boon [1993] 2 CLJ 480 HC ***(refd)***
Reynolds v. Times Newspaper Ltd [2001] 2 AC 127 ***(refd)***
S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy & Anor [2011] 1 CLJ 460 CA ***(refd)***
S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***
Singapore Tourism Board v. Children's Media Ltd [2008] 3 SLR (r) 981 ***(refd)***
Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee [2015] 8 CLJ 477 FC ***(refd)***
Tan Song Gou v. Goh Ya Tian [1982] CLJ 413; [1982] CLJ (Rep) 880 CA ***(refd)***
Yap Choo Hoo v. Tahir bin Yasin & Anor [1967] 1 LNS 212 HC ***(refd)***
YB Dato' Hj Husam Hj Musa v. Mohd Faisal Rohban Ahmad [2015] 1 CLJ 787 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 73A, 90A
Rules of Court 2012, O. 34 r. 2(2)(c), (d), (e)

Other source(s) referred to:
Gatley on Libel And Slander, 10th edn, p 983
Sarkar on Evidence, 12th edn, vol 1, p 581
Sarkar on Evidence, 14th edn, vol 2, p 2006

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[Editor's note: For the High Court judgment, please see Melawangi Sdn Bhd v. Yeo Ing King [2016] 10 CLJ 469 (overruled in part).]

Reported by Najib Tamby

A

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/defendant in a defamation suit appeals against the decision of the learned High Court Judge who allowed the respondent/
B plaintiff's claim notwithstanding the defendant's argument before the High Court was that the various alleged defamatory statement found in three letters were placed in Bundle A, that is to say that the contents have been agreed and there is no need for formal proof. In consequence, the defendant says that the plaintiff's suit ought to have been dismissed by the trial court *in limine*.

C **[2]** It was contended by the plaintiff in this case that Bundle A documents mean only the contents have been agreed but not the truth and in consequence the defendant needs to establish the usual defence such as the truth of the statements, qualified privilege, etc. As the defendant had not led any evidence, the learned trial judge had ruled that the defendant is liable and
D awarded a sum of RM5 million in damages.

[3] I take the view that, once a document is placed in agreed Bundle A, the contents as well as the truth is deemed to be proved. Placing the three letters in Bundle A is fatal to the plaintiff's case in a defamation suit and the trial judge ought to have dismissed the plaintiff's suit *in limine*.

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Preliminaries

[4] To save judicial time, I will not repeat the facts of the case as it had been done in great detail by the learned trial judge. The majority judgment of this coram which had dismissed the appeal must also be read together with
F this judgment to appreciate the facts in the proper perspective.

[5] It is well known among practitioners that there are two lines of authorities in respect of agreed bundles, to say:

(i) If a document is in Bundle A, it means that the maker need not be called, the authenticity of the document is not disputed and contents of the
G document is admitted and deemed proved. That is to say, the content as well as its truth is proved. (See *Henry Trading Co Ltd v. Harun* [1966] 1 LNS 65; [1966] 2 MLJ 281; *Goh Ya Tian v. Tan Song Gou & Ors* [1981] 1 LNS 39; [1981] 2 MLJ 317 (HC); *Tan Song Gou v. Goh Ya Tian* [1982] CLJ 413; [1982] CLJ (Rep) 880; [1983] 1 MLJ 60 (CA)).

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(ii) The second line of authorities to say if a document is in Bundle A, it means that contents is only admitted but not its truth unless otherwise has been agreed by parties. (See *Yap Choo Hoo v. Tahir bin Yasin & Anor* [1967] 1 LNS 212; [1970] 2 MLJ 138; the purported majority decision of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ
I 509).

[6] The jurisprudential flaw in the second line of authorities is that it does not take into consideration that: (i) if the truth of the contents need to be proved, then it should be in Part B that is to say the contents and its truth there need to be proved, which will follow that the maker need to be called for cross-examination unless the exception to the rules of the hearsay applies; (ii) if it is a Part A document, then the maker need not be called.

[7] The problem related to the second line of authorities was done away with the introduction of Rules of Court 2012 (RC 2012) O. 34 r. 2(2)(c) to (e). Learned counsel for the appellant on this issue says as follows:

> 19. The confusion regarding the extent of agreement in an Agreed Bundle of Documents was considered and discussed in *Janab's Key to Civil Procedure in Malaysia and Singapore* 4th Edition (2005) (see Tab 7 of IA(P) - JILID 2, in particular page 339) where the author, Tuan Haji Hamid Sultan Bin Abu Backer (as he then was) concluded as follows:
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> > It is suggested that one way to overcome the issue of whether an agreed bundle of document is made with or without reservation is to get the consent of the parties to have the agreed bundle of documents marked in two parts; Part I to contain all the documents in which the formal proof is dispensed with and the contents of the document is agreed to have been proven and Part II to contain documents where formal proof is dispensed with but the contents are not admitted and the maker is to be made available for cross-examination.
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> 20. The suggestion by the author was exactly what the Courts eventually did in order to resolve the confusion. The Courts developed a practice of having an Agreed Bundle of Documents divided into parts. Part I contained all the documents in which the formal proof is dispensed with and the truth of the contents of the document is agreed to have been proven and Part II contained documents where formal proof is dispensed with but the contents are not admitted and remain to be proven. Part III in the Agreed Bundle of Documents comprising of documents where formal proof was not dispensed with and contents were not admitted. It is to be noted that some Courts used Bundles A, B and C as alternative names to Parts I, II and III.
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> 21. With this practice, there was no longer any confusion as to the extent of agreement regarding documents in an Agreed Bundle of Documents. Each party knew exactly what the effect of each document was by virtue of where a document was, by agreement, classified - Parts I, II or III or alternatively, Bundles A, B or C.
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> 22. This practice was the precursor to the Parts A, B and C codified in O. 34 r. 2 of the Rules of Court 2012, in particular r. 2(c)-(e).

A **Jurisprudence Relating To The Agreed Bundle Of Documents A, B And C, Case Laws And Practice Note Or Directions Before The Coming Into Force Of O. 34 r. 2(2)(c) To (e) Of RC 2012**

[8] It is trite that the Evidence Act 1950 (EA 1950) has no provision for bundle of documents. The provision for bundle of documents came into B existence by virtue of case laws and/or practice directions and/or rules of court. The purpose to introduce the concept of agreed and non-agreed bundle of documents was to save costs and time, and to mitigate the strict provisions of the procedure for introducing primary and/or secondary evidence and also to rule out hearsay evidence by consent of parties. That is to say, the strict C rule of evidence required that a document if need to be introduced as evidence must be introduced through the maker of the document which document in practice would be marked as exhibit by the court, provided the hearsay rule is not breached. Marking the document as exhibit does not mean that the authenticity, contents as well as the truth of the contents is admitted. D If the opponent says he accepts the contents; in jurisprudential sense, it means that the authenticity of the document in dispute is not challenged. If the opponent says that he admits the contents, the jurisprudential effect is that he accepts the authenticity of the document as well as its truth and the hearsay rule may not be in issue. (See ss. 17 to 39 of EA 1950).

E **[9]** When the contents of the document is admitted, the person who seeks to introduce the evidence need not prove the contents of the document to establish the truth by calling at times a number of witness to do so. For example, by introducing a document by a purported maker through the maker does not mean that the document is authentic. It has to be proved that F the purported maker was the author of the document. By having established the authenticity, it must also be established that the contents are that of the maker and the contents does not breach the hearsay rules. If the contents breach the hearsay rule, the person introducing the evidence must call further evidence. This procedure will add to costs and judicial time. Having established the contents, and if the opponents does not admit to the contents, G then the person introducing the evidence may need to call further evidence to strengthen the truth of the statements to provide the necessary probative force to succeed. Again, all these steps will add to costs and time. In consequence, courts have formulated agreed bundle of documents to save costs and time. It is a voluntary procedure. If the parties agree to place a H document in Bundle A, it means that the maker need not be called, the authenticity of the documents is not in dispute, the contents is admitted, ie, the contents does not suffer from hearsay evidence and/or to its truth.

[10] If there is a dispute as to contents and/or its truth, it has to be placed I in Bundle B. For example, in a case where the plaintiff is suing the defendant for breach of facility granted by the bank and the amount of claim is in dispute, the defendant can admit a bank statement to be placed in Bundle B and even agree to dispense with the maker of the statement to give evidence, to save costs and time and proceed to call his own witness such as a chartered

accountant to show that the sum claimed in the bank statement is erroneous. In essence, placing a document in Bundle B does not mean that the maker must be called but if the opposing party dispense with the calling of the maker then that document must be marked as exhibit subject to proof of the contents. In any event, the court may want to give some probative force to that document taking into account a holistic view of the facts of the case. (See *Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor* [2008] 10 CLJ 491; *YB Dato' Hj Husam Hj Musa v. Mohd Faisal Rohban Ahmad* [2015] 1 CLJ 787). In addition, the makers for Bundle B documents may be dispensed with, if the exception to the hearsay rule provided under the Evidence Act becomes applicable. (See EA 1950 ss. 32, 73A, 90A, etc). In such event, the relevant documents must be marked as exhibits during trial.

[11] Placing in Bundle C means that the authenticity, contents and its truth is not admitted and the maker of the document must be called and the contents of the document must be proved and hearsay evidence strictly will not be admissible. Placing in Part C means that full force of the Evidence Act will be made applicable and a party may have to spend substantial costs and time to prove. The makers for Bundle C documents may be dispensed if the exception to the hearsay rule provided under the EA 1950 becomes applicable. (See EA 1950 ss. 32, 73A, 90A, etc). In such event, the relevant documents must be marked as exhibits during trial.

[12] It must be noted that strict provision of the practice note or directions and/or rules of court may heavily penalise the party in costs if the court takes the view that the relevant documents in dispute ought to have been placed in Part A and/or B and not in C. For example, in relation to costs and agreed bundle, practice note of 1970 states:

> Because majority of legal practitioners neglect, either from indolence or ignorance, to avail themselves of the provisions of RSC Order 32, the following directions are issued by the Honourable Chief justice to stop further wastage of the courts time.
>
> 1. These directions will apply to all claims, whether or not arising out of road accidents.
>
> 2. An Agreed Bundle of Documents shall in all cases be filed at least seven (7) days before the trial of the action, comprising all relevant documents, the authenticity of which is not challenged. Proof of any such document by "formal production of the original or copy thereof (or by) any witness tendering it or producing it in Court" is unnecessary, notwithstanding the views expressed by the judge in [1970] 2 MLJ at p. 140. This decision is given pursuant to Order 37 rule 1b(2)(c). The object of thus obtaining admissions is to preclude the necessity of formally proving documents or facts admitted; any party unreasonably refusing or neglecting to admit any documents or facts, when called upon to do so whether pursuant to a notice to admit or to agree the inclusion of any document in an Agreed Bundle of Documents may be ordered to pay the costs of proof occasioned thereby.

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3. A Statement of Agreed Facts shall, wherever possible be filed at the same time as the Agreed Bundle of Documents, in order to save time and costs by dispensing with the production of witnesses called merely to testify to facts which are not in dispute or likely to be disputed.

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4. Legal practitioners are reminded:

(a) that failure to comply with the directions contained in Practice Note No. 1 of 1969 will result in Trial judge or Special President of the Sessions Court refusing to try the case on the date fixed and all costs of and incidental to the postponement may be ordered payable by the practitioner or practitioners responsible therefore;

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(b) that the provisions of Order 32 may often be resorted to with advantage, in addition to the Agreed Bundle of Documents and the Statement of Agreed Facts, as an effective means of saving time and costs.

D

5. This Practice Note will take effect from December 1, 1970.

Cases Before RC 2012

[13] As early as the year 1966, the Federal Court in *Henry Trading*'s case had stated that where there is an agreed bundle of documents there is no need to prove these documents. Wan Suleiman J sitting in the Federal Court had this to say:

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> The other statement of law made by the learned trial judge on which I feel I should comment is that part of the judgment wherein he said that the contents of an agreed bundle of documents must be proved unless such contents are admitted by the other side. **With respect. I say that where there is an agreed bundle of documents there is no need to prove these documents. This rule is too well established in law to be doubted**. (emphasis added)

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Wan Suleiman J's decision was consistent with the views express by *Sarkar on Evidence* in its 12th edn, vol. 1 p. 581:

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> Documents are either proved by witnesses or marked on admission. **When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted, and cannot be challenged by cross-examination or otherwise**. In case of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents which can be challenged by cross-examination or otherwise (*Lionel Edwards Ltd. v. S.A*. 1967 C 191).
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> **Where documents were produced and not disputed, the Privy Council held that they should be receive without proof** (*Takai v. Beglar* 6 MIA 521; *Nanda Kishore v. Ram Kalpa* 6 BLR Ap. 49). (emphasis added)

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[14] What is essential to note here is the above statement of Sarkar consists of two parts which are relevant to the jurisprudence relating to Part A and Part B documents under O. 34 of RC 2012. That is to say that when the

contents are admitted it need not be proved and it relates to Part A documents. When the contents are in dispute that means the content and/or truth is disputed and it has to be placed in Part B documents. It is either this or that and cannot be a nefarious ruling as advocated by the plaintiff to say that 'contents admitted does not mean truth is admitted when the cause of action is defamation'. If truth is not admitted then it falls on Part B. I must say that pleading rules and voluntary agreement to bundle of documents are two separate issues. If the plaintiff in a defamation suit places the alleged defamatory statements in Bundle A, the defendant in law will have no case to answer as the truth of the statement made by the defendant is deemed to be admitted by the plaintiff. In my view, placing the defamatory statements in Bundle A is purely a misconceived act and if it is not rectified by leave of the court then it will be fatal to the plaintiff's case.

[15] *Henry Trading*'s case which was mentioned earlier was endorsed by the High Court of Singapore and that decision was upheld by the Court of Appeal of Singapore in the case of *Tan Song Gou v. Goh Ya Tian* [1982] CLJ 413; [1982] CLJ (Rep) 880; [1983] 1 MLJ 60. In *Goh Ya Tian*'s case, the High Court held that "the documents in the agreed bundle were admitted into evidence by consent without production of the maker or the originals and the contents formed part of the evidence before the court".

[16] The Singapore court also refused to accept the proposition of Sharma J in the case of *Yap Choo Hoo v. Tahir bin Yasin & Anor* [1967] 1 LNS 212; [1970] 2 MLJ 138, where His Lordship observed:

> I am not prepared to subscribe to the view that once a document forms part of the agreed bundle of documents it automatically proves itself without any formal production of the original or a copy thereof and without any witness tendering it or producing it in court. If it were not so, it would be against all concepts of justice as the result of it would be that one of the parties would be deprived of the right to cross-examine a witness who would otherwise be required to produce the document even though formally.

[17] His Lordship Sharma J's views were also rejected in Practice Note 3 of 1970 which I have stated earlier. What was said by Sharma J appears to be tacitly accepted by the decision of Peh Swee Chin FCJ without taking into account the decision in the case of *Tan Song Gau*. His Lordship purportedly in delivering the majority decision had this to say by writing part of the first sentence in bold letters, as follows:

> **IN THE ABSENCE OF ANY EXPRESS CONDITIONS REGARDING THE INCLUSION OF ANY OF THE DOCUMENTS IN THE AGREED BUNDLE OF DOCUMENTS**, speaking for myself, I have always taken the agreed bundle in a civil case to mean as follows without meeting any contradiction or any serious contradiction from any member of the Bar or any appellate court in my decades at the Bar or on the Bench.

A First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling eg, their makers.

Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or
B *indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.*

Thirdly, such documents therein do not form automatically a part of the evidence of the case in question ipso facto, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at
C *any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.*

Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, *inter alia*, to any absence of challenge by either of the parties on any part of
D the document and similarly, the question of weight, eg, either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including any "written hearsay" contained therein. The court, may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate for reasons for such refusal.

E

I find support for my views or some of my views in a learned article under the title of "The Bundle of Discord" written by Mr Lim Kean Chye a very senior member of the Malaysian Bar, published in "Insaf", its September issue, 1988; also Shankar J's (now Shankar JCA's) judgment in *Chong Khee Sang v. Pang Ah Chee* [1984] I MLJ 337; both Federal Court cases of *Henry*
F *Trading v. Harun* [1966] 2 MLJ 281 and *Borneo Co v. Penang Port Commission* [1975] 2 MLJ 204; Practice Note no. 1/48; Practice Note no. 2/ 77 and s. 58 of the Evidence Act 1950.

[18] I have underlined above, statements which relates to some jurisprudential issues which are not harmonious with the Singapore decisions
G which I have stated above as well as the decision in *Henry Trading*'s case. The later decisions of Singapore courts are consistent with the decision of *Tan Sang Gau v. Goh Ya Tian* [1982] CLJ 413; [1982] CLJ (Rep) 880; [1983] 1 MLJ 60 (CA). (See *Chua Gek Kuon v. Seow Chai Seng* [1991] 1 SLR(R) 614; *Ng Bee Lian v. Fernandez* [1994] 2 SLR(R) 179; *Press Automation Technology*
H *Pte Ltd v. Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR (R) 712; *Jet Holding Ltd v. Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769; *Singapore Tourism Board v. Children's Media Ltd* [2008] 3 SLR (r) 981).

[19] Justice Gopal Sri Ram JCA (as he then was) sitting in the Federal Court in the same case, relied on the Singapore case of *Goh Ya Tian* (HC)
I and also *Tan Song Gau* (CA) went on to say that where a document is included in the agreed bundle without any qualification, then no question as to formal proof arose and its contents may be relied upon to establish a fact in issue. What the proposition means is that the agreed bundle of documents

can be of two types, one where contents and truth is not disputed and the other is where the content and the truth is disputed. When a document is placed in Bundle A without any qualification, then it is deemed to be proved. If there is a qualification then it has to be placed in Bundle B as per O. 34 r. 2. The document in our instant case is one made without any qualification and in consequence, the contents or its truth need not be proved as advocated by His Lordship Gopal Sri Ram as follows:

> The appellants now appeal to this court. Their counsel has argued that both courts below were in error when they held the first respondent's police report to be inadmissible. The decision of the former Federal Court in *M.A. Clyde v. Wong Ah Mei* [1970] 2 MLJ 183, 1, was prayed in aid and the following passage in the judgment of Gill FJ (later CJ Malaya) was read to us:
>
> > In my judgment if a first information report contains an admission which is relevant to a claim in a civil action against him, it is admissible in evidence under ss. 17, 18 and 21 of the Evidence Ordinance 1950. 1 find support for this from the decision in *Bishen Das v. Ram Labhaya* AIR [1916] Lah. 133 with which I respectfully agree, and which went so far as to say that though an admission of guilt made by a defendant to a police officer is not receivable in evidence as a 'confession' as against him if he is on his trial as an accused person, yet it is acceptable in a civil suit as an admission under ss. 17, 18 and 21 of the Evidence Act. The admission, of course, cannot be regarded as conclusive, and it is open to the person who made it to explain it away, which was not done in this case.
>
> I may add that a decision to the same effect is that of the Singapore Court of Appeal in *Tan Song Gou v. Goh Ya Tian* [1983] I MLJ 60, where Wee Chong Jin CJ said of the appellant driver's police report that:
>
> > It is a documentary statement in which he stated that his pickup collided into the rear of the taxi while the taxi was stationary. It was an admission by Tan Song Gou that his pickup collided into the rear of Tan Ah Lek's stationary taxi (see ss. 17 and 18 of the Evidence Act). It was admitted in evidence by agreement of the parties as one of the documents in the agreed bundle (exh AB) at the trial and its contents accordingly need not be proved by calling the person who recorded the statement.
>
> By virtue of that admission Tan Ah Lek had adduced evidence at the trial that Tan Song Gou's pickup collided into his stationary taxi and in the absence of other evidence a court is entitled to come to the conclusion that the damage to Tan Ah Lek's taxi as a result of the conclusion was due to the negligent driving of Tan Song Gou.
>
> Having considered the arguments of counsel on both sides and the authorities cited by them, I am of opinion that the following propositions may be taken as well-settled:

(1) Whether the contents of a document that has been included in an agreed bundle may be used by either party to prove or disprove a fact in issue depends entirely upon the terms of the agreement between the solicitors having conduct of an action. If by their agreement they dispense with formal proof and also agree to the truth of the contents of a particular document, then its contents may be relied upon either side to establish or to disprove a fact in issue. On the other hand, if the agreement is only to forgo proof of the making of the document, then, the contents may not be so used. See, *Yew Lean Finance Development (M) Sdn Bhd v. Tan Gin Thong* (*supra*).

(2) Where a document is included in an agreed bundle without any qualification, then no question as to its formal proof arises and its contents may be relied upon to establish a fact in issue. See, *Henry Trading Co Ltd v. Harun* [1966] 2 MLJ 281; *Borneo Co (M) Sdn Bhd v. Penang Port Commission* [1975] 2 MLJ 204.

(3) A party may rely upon an admission made by his opponent in a police report (whether or not it be first information) or other documentary hearsay included in an agreed bundle on the condition that only its formal proof is dispensed with: *M.A. Clyde v. Wong Ah Mei* (*supra*); *Tan Song Gou v. Goh Ya Tian* (*supra*). However, if such a document is wholly exculpatory of the maker, then it is pure hearsay and inadmissible: *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ 175; *Chuah Ah Chee & Ors v. Gurdial Singh & Anor* (*supra*). The reasons for its inadmissibility appear sufficiently in the judgment of Ali FJ in *Wong Thin Yit* and that of Edgar Joseph Jr J in *Chuah Ah Chee*. They therefore require no reiteration here.

[20] In my view, the above cases have been overtaken by procedural events by the introduction of RC 2012 in particular O. 34 r. 2(2)(c) to (e) which governs the procedural law in relation to agreed and non agreed bundle of documents. In my view, the bundle of documents in O. 34 consists of two parts. The first part is called agreed bundle Part A and B (previously referred to as Part I and II of agreed bundle by practitioners) and the second part is the non agreed bundle and is called Part C, though the rule itself does not make that distinction and only says bundle of documents and refers to them as Bundle A, B and C. The said O. 34 r. 2(2)(c) to (e) reads as follows:

(c) the period within which the parties are to file a bundle of all documents that will be relied on or referred to in the course of the trial by any party, including documents referred to in the witness statement of a witness;

(d) the contents of the bundle of the documents referred to in subparagraph (c) shall be agreed on between all parties as far as possible and this bundle of agreed documents shall be filed by the plaintiff and marked as Part A;

(e) if the parties are unable to agree on certain documents, those documents on which agreement cannot be reached shall be included in separate bundles and each such bundle shall be ! filed by the plaintiff and marked as follows:

(i) Part B - documents where the authenticity is not disputed but the contents are disputed;

(ii) Part C - documents where the authenticity and contents are disputed.

[21] Bundle A document clearly must mean that the contents are not disputed as to content or to its truth. If the contents are disputed as to content or its truth then it has to be in Part B. In this respect, I agree with the submission of learned counsel for the appellant and will allow the appeal with costs of RM30,000 here and below and order the deposit to be refunded.

En Passant

[22] *En Passant*, my decision as well as the decision of the majority may cause substantial impact in relation to Bundle A documents for pending cases in the court below as well as on appeal. For that reason, I will suggest to the parties to appeal to the Federal Court immediately with a certificate of urgency to arrest any controversies and/or miscarriage arising from the decision of this court, taking into consideration that the appellant has brought to our attention by way of submission as follows:

> The defamation suit by the Plaintiff against the Defendant is in fact one of 13 related defamation suits brought by the Plaintiff (who is the developer of the Amcorp Trade Centre ("ATC")) against various members of the Amcorp Trade Centre Owners & Tenants Association ("ATCOTA"). Of the 13 suits brought by the Plaintiff, 9 were struck out by the Shah Alam High Court on 28.04.2011, leaving 4 suits to proceed to trial. Of the 4 suits, one (Shah Alam High Court Civil Suit No. 22-1988-2008) was dismissed after trial by Y.A. Amelia Tee Hong Geok Abdullah on 21.01.2016. Another (Shah Alam High Court Civil Suit No. 22-1946-2008) was dismissed after trial by Y.A. Datuk Hanipah Binti Farikullah on 21.03.2016. The third suit (Shah Alam High Court Civil Suit No. 22-1993-2008) has been completed before Y.A. Dato' Wan Ahmad Farid Bin Wan Salleh and has been fixed for case management on 01.07.2016 for parties to file respective written submissions. The fourth and final suit is the only one the Plaintiff has succeeded and is also the one that is the subject of this appeal to this Honourable Court.

[23] In the instant case, I take the view based on the pleading and the evidence that the plaintiff's case does not satisfy the requirement to succeed in a defamation case which is related to trading reputation and not reputation *per se* as advocated in the recent decision of *Mak Khuin Weng v. Melawangi Sdn Bhd* (B-02-2191-12-2014) which was presided by Hamid Sultan bin Abu Backer JCA, Abdul Karim bin Abdul Jalil JCA and Asmabi binti Mohamad JCA. As the appellant did not submit on this issue, I will not deliberate further on the pleading and evidential issues relating to trading reputation.

[24] For reasons stated above (except paras. 22 and 23), I will allow the appeal as stated above.

I hereby order so.

Abdul Rahman Sebli JCA:

Introduction

[25] This appeal concerns an important but often taken for granted question of law: What is the evidential status of documents placed in Part A of the bundle of documents ("the BOD") which the parties rely on or refer to in the course of the trial? This bundle is commonly known as the "bundle of agreed documents".

[26] After a full trial of the action in the High Court, the learned Judicial Commissioner ("JC") found the defendant liable and awarded a global sum of RM5 million in general, exemplary and punitive damages to the plaintiff. The instant appeal by the defendant is against both liability and quantum.

[27] We heard arguments on 30 June 2016 and reserved judgment to a date to be fixed. Having deliberated on the matter, we have reached a split decision. Our learned brother Justice Hamid Sultan Abu Backer would allow this appeal and has written a dissenting judgment whereas my learned brother Justice Prasad Sandosham Abraham and I would dismiss the appeal on liability. This then is our majority decision, which we now deliver.

The Salient Facts

[28] For convenience, we shall refer to the parties as they were in the court below, namely the appellant as defendant and the respondent as plaintiff. The facts in-so-far as they are relevant to issue are these. The plaintiff is a company involved in the development of a piece of commercial property known as Amcorp Trade Centre for sale, rental and investment. The defendant was at the material time the Chairman of the Amcorp Trade Centre Owners & Tenants Association.

[29] The plaintiff sued the defendant for defamation. The statements alleged to be defamatory of the plaintiff were contained in three documents in the form of letters which both parties agreed were to be included in Part A of the BOD. The statements contained allegations that the plaintiff mismanaged the Amcorp Trade Centre, embezzled the funds, conducting the Annual General Meeting unfairly, abuse of power, oppressive management, cheating, dishonest conduct, and collecting unlawful profit.

[30] The three documents were subsequently admitted and marked as evidence without any reservation by both the plaintiff and the defendant. The defence raised by the defendant was two pronged, ie, justification and qualified privilege. It is what we can perhaps describe as a defence of admission and avoidance - admitting that the statements were defamatory of the plaintiff but avoiding liability by saying that the statements were true and protected by privilege and therefore not actionable in defamation.

[31] Before the trial started, the defendant raised the point that since the defamatory statements were included in Part A of the BOD, the plaintiff was deemed to have agreed to the truth of the statements and as such had no right

to cross-examination on the contents of the documents. The truth would be that the plaintiff had mismanaged the Amcorp Trade Centre, embezzled the funds, conducting the Annual General Meeting unfairly, abuse of power, oppressive management, cheating, dishonest conduct, and collecting unlawful profit.

[32] If we were to accede to the defendant's argument, it would mean that he had established his defence of justification without having to utter a word because clearly the truth of these allegations would provide a complete defence to the claim: *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor* [2014] 3 CLJ 560. See also *S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy & Anor* [2011] 1 CLJ 460 where this court held that no action lies in regard to a statement which injures the reputation of another if the statement is true.

[33] On the right to challenge the contents of the documents, learned counsel for the defendant referred to the High Court decision in *Mohd Nazari Ab Majit v. Tan Keo Hock & Anor* [1999] 1 CLJ 601 where Augustine Paul J (as he then was) cited with approval the following passage in the judgment of AK Das J in *Lionel Edwards Ltd v. State of West Bengal* AIR [1967] Cal. 191:

> Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted the result being, the contents cannot be challenged either by way of cross-examination or otherwise.

[34] The above passage was highlighted in yellow by learned counsel at tab 6 of the defendant's bundle of authorities but he omitted, inadvertently we believe, to similarly highlight the following passage in the same judgment which followed right after the above passage:

> In respect of documents marked on admission by dispensing with formal proof, the contents are evidence, **although the party admitting does not thereby accept the truth of the contents** and is free to challenge the contents by way of cross-examination or otherwise.
>
> (emphasis added)

The High Court's Finding On The Issue

[35] The learned JC did not rule on the point at the close of the case for either side. Her "preliminary finding" was only made known in para. 27 of her grounds of judgment, but not before expressing her utter displeasure with the defendant for raising the issue, as the following terse remarks at paras. 22 and 26 of her judgment would show:

> [22] The desperate stratagem employed by the Defendant in keeping absolute silence on the issue of the documents marking, and only contending on the marking at the final hour is utterly insidious.

A [26] In any case, this Court is not about to stand idle while the Defendant is allowed to employ such insidious tactics to defeat justice by technical means. As much as procedural law is an important essence of the law, the same procedural law cannot be exploited as an underhanded manoeuvre to defeat the ends of justice. Order 1A of the Rules of Court 2012 has since the Rules' inception codified the Court's discretion to
B weigh the overriding interest of justice with the technical compliance of the Rules. And it is vividly clear in the present case, that even if there is any technical non-compliance of the Rules (which this Court disagrees) such technicality does not outweigh the overriding interest of justice, especially considering the insidious manner in which the technicality was raised.
C

[27] Thus, it is this Court's preliminary finding that this latent, deliberate, malicious and insidious contention by the Defendant shall ultimately and obviously fail.

[36] Very strong language indeed, which we have to say was unduly harsh
D considering the fact that the defendant was raising a legitimate point of law. It was urged upon us that the learned JC's decision cannot be allowed to stand as it would cause chaos in litigation practice. According to learned counsel, the decision would mean that litigants will not be able to ascertain the exact agreement on the documents in the agreed bundle of documents.
E This, added counsel, would render meaningless the classification of documents into Parts A, B and C as it could always be given a different meaning by the court at the end of the trial.

The Central Issue

[37] The central issue is whether, by including the three documents in
F Part A of the BOD, the plaintiff was deemed to have agreed not only as to the authenticity of the documents but also as to the truth of the contents, meaning to say the plaintiff had not only agreed that the documents contained the defamatory statements but had also agreed that the statements were true of itself.

G **[38]** If that were to be the correct position of the law, the plaintiff's case would have collapsed even before the trial started, a technical knockout so to speak. This has to be so because if it was agreed (which is another way of saying that it was admitted) that the statements alleged to be defamatory of the plaintiff were true, then the defence of justification would have been
H established without any need for proof. A fact that is agreed or admitted does not require formal proof. It becomes the truth upon agreement or admission, provided it is admissible in evidence.

[39] The defendant relied on O. 34 r. 2(2)(d) of the Rules of Court 2012
I ("the Rules") to argue that having chosen to include the three defamatory statements in Part A of the BOD, the plaintiff was estopped from disputing the truth of the statements. For context and ease of reference we reproduce below O. 34 r. 2(2)(c), (d) and (e) of the Rules:

(2) At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including -

(c) the period within which the parties are to file a bundle of all documents that will be relied on or referred to in the course of the trial by any party, including documents referred to in the witness statement of a witness;

(d) the contents of the bundle of documents referred to in subparagraph (c) shall be agreed on between all parties as far as possible and this bundle of agreed documents shall be filed by the plaintiff and marked as Part A;

(e) if the parties are unable to agree on certain documents, these documents on which agreement cannot be reached shall be included in separate bundles and each such bundle shall be filed by the plaintiff and marked as follows:

(i) Part B - documents where the authenticity is not disputed but the contents are disputed;

(ii) Part C - documents where the authenticity and contents are disputed;

[40] The procedure under O. 34 r. 2 is meant to secure the just, expeditious and economical disposal of the action or proceedings. Where so ordered by the court at the pre-trial case management, para. (d) of O. 34 r. 2 imposes on the parties an obligation to agree, as far as possible, on the contents of the documents. Once agreed, the documents are to be compiled and filed by the plaintiff and marked as "Part A". It is only when there is no agreement on the contents of certain documents that the plaintiff is required by para. (e) to file separate bundles, to be marked "Part B" or "Part C" respectively.

[41] Part B documents are documents that are only agreed as to the authenticity but not as to the contents. For this class of documents, the existence and authenticity of the documents need no formal proof but the contents still need to be proved as they are disputed. The dispute can be over the details or accuracy of the contents as they appear on the face of the documents. Cross-examination is allowed on these issues but not on the existence and authenticity of the documents.

[42] Part C documents, on the other hand, are documents where both authenticity and contents are disputed and must therefore be strictly proved by calling the makers of the documents or those who can confirm their authenticity and contents.

A **Contents And Truth Of Contents**

[43] It is a misconception to think that for the documents in Part A, "everything is agreed". Rule 2(2)(d) of O. 34 only speaks of contents of the documents. It does not speak of the truth of the contents. The question is, what does the rule envisage when it requires agreement on the contents of
B the documents? Does it mean agreement on the truth of the contents, or does it only mean agreement on the fact that the documents contain what they purport to contain, ie, the contents as they appear on the face of the documents?

C **[44]** There is of course a difference between agreeing on the contents of a document and agreeing on the truth of the contents. If I agree that a document contains a statement that is defamatory of me, it does not necessarily follow, as night follows day, that I agree to the truth of the statement.

Our View On r. 2(2)(d)

D **[45]** Having given careful consideration to the matter, we take the view that what r. 2(2)(d) envisages is only agreement on the contents of the documents and not the truth of the contents, unless agreed by the parties. In the present case, there was no such agreement between the plaintiff and the defendant at the pre-trial case management. Therefore the agreement by the parties to
E place the documents in Part A of the BOD was only an agreement that the documents contained the impugned defamatory statements and not an agreement that the defamatory statements were true of the plaintiff.

[46] It is true that it was the plaintiff itself who chose to include the three defamatory statements in Part A of the BOD, but it will be stretching the
F imagination to suggest that by doing so the plaintiff had admitted to the truth of the statements. That is wholly illogical and runs counter to the pleadings and the plaintiff's object of filing the claim in the first place.

[47] Order 34 r. 2 is not designed to be a trap for the unwary to fall into. It is designed to simplify the procedure in a civil trial and to expedite the
G disposal of cases. Whether the statements were defamatory and whether they were the truth were matters that the court had to decide. The flaw in the defendant's argument is that it equates contents with truth.

[48] It was strenuously argued that if the plaintiff disputed the truth of the defamatory statements, it should have included the documents in Part B and
H not in Part A of the BOD. There is force to the argument but as we said, contents and truth are two different things. Like para. (d), para. (e) of O. 34 r. 2(2) only speaks of contents and not truth of contents.

[49] The irony is that if we were to follow the defendant's argument to its
I logical conclusion, then, by placing the documents in Part B of the BOD as suggested by him, he would be deemed to have disputed the truth of the defamatory statements. That would demolish his own pleaded defence of justification as the falsity or untruthfulness of the statements would render the defence unsustainable in law. He would be estopped from denying that the

defamatory statements were untrue and judgment would have to be entered against him without proceeding to trial. There is an old saying that we must be careful with what we wish for.

[50] Thus, in the context of an action for defamation, it does not matter if the defamatory statements are included in Part A, Part B or Part C of the BOD. The truth of the defamatory statements would still have to be established by the party who bears the burden of proving the truth, unless it is agreed between the parties at any stage of the action, including by way of pleadings, that the defamatory statements are true or untrue as the case may be.

[51] The distinction between contents and truth assumes particular importance in an action founded on defamation simply because the nature of the action is such that the truth or otherwise of the statements alleged to be defamatory almost always becomes an issue, hence the defence of justification which relies as its basis on the truth of the statements.

[52] The defendant's argument on the evidential status of the Part A documents is clearly out of alignment with the following precedents, which we consider to be still good law on "agreed documents" although they deal with the procedure before the coming into force of the present rules providing for Part A, Part B and Part C documents:

(i) *Chong Khee Sang v. Pang Ah Chee* [1983] 1 LNS 57; [1984] 1 MLJ 377 where it was held by Sharma J of the High Court that once a document is included in an agreed bundle, it is no longer necessary to prove their existence or execution, nor is it necessary to produce the original. But so far as the contents of the documents are concerned, the truth of the same has still to be proved, in the absence of any specific admission of the facts therein contained.

(ii) *Red and Yellow Omnibus Co Sdn Bhd & Anor v. Chuah Lay Boon* [1993] 2 CLJ 480, another High Court decision (Abdul Malik Ishak JC, as he then was, presiding) which also held that once a document is included in an agreed bundle, it is no longer necessary to prove its existence or execution, nor is it necessary to produce the original. But the truth of the contents of the document has to be proved in the absence of any specific admission of the facts contained therein.

(iii) *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 3 MLJ 693, a Federal Court decision where Peh Swee Chin FCJ in his judgment *inter alia* said at p. 521 (CLJ); p. 706 (MLJ):

> **In the absence of any express conditions regarding the inclusion of any of the documents** in the agreed bundle of documents, speaking for myself, I have always taken the agreed bundle in a civil case to mean as follows without meeting any contradiction or any serious contradiction from any member of the Bar or an appellate court in my decades at the Bar or on the Bench.

> First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling, eg, their makers.
>
> Secondly, **the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly** and such truth of such contents is liable to be challenged in court at the instance of either of the parties.
>
> (emphasis added)

(Note: In the CLJ version of the case as reported in [1997] 4 CLJ 509, the words in italics above are in capital letters).

Gopal Sri Ram JCA (as he then was) who delivered the supporting judgment of the court had this to say at p. 531 (CLJ); pp. 714-715 (MLJ):

> (1) Whether the contents of a document that has been included in an agreed bundle may be used by either party to prove or disprove a fact in issue depends entirely upon the terms of the agreement between the solicitors having conduct of an action. If by their agreement, they dispense with formal proof **and also agree to the truth of the contents of a particular document**, then its contents may be relied upon by either side to establish or disprove a fact in issue. On the other hand, if the agreement is only to forgo proof of the making of the document, then, the contents may not be so used. See *Yew Lean Finance Development (M) Sdn Bhd v. Tan Gin Thong* [1985] 1 CLJ 299.
>
> (2) Where a document is included in an agreed bundle without any qualification, then no question as to its formal proof arises and its contents may be relied upon to establish a fact in issue. See *Henry Trading Co Ltd v. Harun* [1966] 2 MLJ 281; *Borneo Co (M) Sdn Bhd v. Penang Port Commission* [1975] 2 MLJ 204.
>
> (emphasis added)

Paragraph (2) above must be read in the context of para. (1), in particular the words we highlight in bold.

(4) *Henry Trading Co Ltd v. Harun* [1966] 1 LNS 65; [1966] 2 MLJ 281, another Federal Court decision where Wan Sulaiman J (as he then was) delivering the oral judgment of the court held:

> The other statement of law made by the learned trial judge on which I feel I should comment is that part of the judgment wherein he said that the contents of an agreed bundle of documents must be proved unless such contents are admitted by the other side. With respect, I say that where there is an agreed bundle of documents there is no need to prove these documents. This rule is too well established in law to be doubted.

(v) *Borneo Co (M) Sdn Bhd v. Penang Port Commission* [1975] 1 LNS 5; [1975] 2 MLJ 204, another Federal Court decision where Lee Hun Hoe CJ (Borneo) cited with approval the following passages in *Sarkar on Evidence*, 12th edn, vol. 1 where the learned authors stated at p. 581:

> Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted, and cannot be challenged by cross-examination or otherwise. *In case of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents which can be challenged by cross-examination or otherwise* (*Lionel Edwards Ltd v. S.A.* 1967 C 191).
>
> Where documents were produced and not disputed, the Privy Council held that they should be received without proof (*Takai v. Beglar* 6 MIA 521; *Nanda Kishore v. Ram Kalpa* 6 BLR Ap. 49).
>
> (emphasis added)

[53] We must point out however that these are not cases on defamation where the truth or otherwise of the defamatory statement(s) becomes an issue. Except for *Borneo Co (M) Sdn Bhd*, which is a case on breach of duty by bailees and where the documents were disputed, the rest are cases on the tort of negligence arising from road traffic accidents. The factual matrix of the cases are therefore different.

[54] Be that as it may, having regard to the issue before us, the *ratio decidendi* of the cases are still relevant and the three Federal Court decisions are binding on this court as they deal with "agreed documents" which would, if the cases were to be decided today, fall squarely under Part A of the BOD.

[55] The defendant cited the Singapore Court of Appeal case of *Tan Song Gou v. Goh Ya Tian* [1982] CLJ 413; [1982] CLJ (Rep) 880; [1983] 1 MLJ 60 for the proposition that "the documents in the agreed bundle were admitted into evidence by consent without the production of the maker or the originals and the contents formed part of the evidence before the court".

[56] With due respect, the defendant's reliance on the decision is misconceived. First of all, it is trite jurisprudence that the decisions that bind us are the decisions of our apex court and not the decisions of any other apex court, no matter how persuasive they may be. Secondly, the *ratio decidendi* of the case must be understood in its proper factual context. The factual context in which the case was decided is reflected, accurately in our view, in headnote (1) and (2) of the report, as follows:

(1) The appellant's police report was the documentary statement in which he stated that his pickup collided into the rear of the taxi while the taxi was stationary. It was admitted by the appellant that his pickup collided into the rear of Tan Ah Lek's stationary taxi. It was admitted in

A evidence by agreement of the parties as one of the documents in the agreed bundle and its contents accordingly need not be proved by calling the person who recorded the statement;

(2) By virtue of the admission, Tan Ah Lek had adduced evidence at the trial that the appellant's pickup collided into his stationary taxi, and in the absence of other evidence, the court was entitled to come to the conclusion that the damage to the said taxi as a result of the collision was due to the negligence of the appellant.

[57] It is clear that what the court considered to be an admission by the appellant was his admission in his police report that his pickup collided into the rear of the stationary taxi. There is nothing in the judgment to even remotely suggest that the court considered such admission to also mean an admission by the appellant that he was negligent in causing the collision. That was a conclusion that the court could draw from the evidence. This is clear from headnote (2).

[58] Juxtaposed with the facts of the case before us, what was admitted by the plaintiff was only to the fact that the defamatory statements were made by the defendant. It was not an admission that the statements were true. Whether the statements were true and therefore protected by justification and qualified privilege was a question of law for the court to decide at the conclusion of the trial based on the evidence before it, unless of course the defendant would admit that the statements were not only defamatory of the plaintiff but were also untrue.

[59] From the perspective of an action founded on defamation, and at the risk of repetition, the correct law in our view is that if the defendant relies on the truth of the defamatory statements placed in either Part A, Part B or Part C of the BOD to avoid liability, he bears the legal burden of proving the truth of the statements. The proof can of course come from the plaintiff's own evidence. But the mere fact that the documents containing the defamatory statements are placed in Part A of the BOD does not provide such proof, unless agreed by the parties.

[60] The plaintiff's burden in such action is only to prove that the statements were made, published and defamatory of the plaintiff. Once these elements of the tort are established, the burden shifts to the defendant to prove the truth of the statements or that they were made on an occasion of qualified privilege or were fair comments.

[61] In *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233, it was held by the then Supreme Court that upon proof of the defamatory nature of the statements, the burden shifts to the defendant to prove that the statements are in substance and in fact true. The burden does not lie on the plaintiff to prove that the defamatory words are false, because the law presumes in his favour: *Bett v. Lawess* [1882] 51 LJQB at p. 361.

[62] In *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86 the Federal Court similarly ruled that the burden of proving the defence of justification and fair comment was on the defendant. Salleh Abas FJ (as he then was) delivering the judgment of the court went on to explain the distinction between burden and onus of proof in the senses in which the expressions were used in that case. This is what the learned judge said at p. 87:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v. Jatashankar Dossa & Ors* AIR 1961 SC 1474 1478 and *Raghavamma v. Chenchamma* AIR 1964 SC 136 143). The first sense, signified by the expression burden of proof such as referred to in section 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. *The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (Gatley on Libel and Slander 7th Edition paras. 351 and 354).* The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to sections 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.
>
> (emphasis added)

[63] The defendant also relied on the decision of the Kuala Lumpur High Court in *Korea Natural Energy Corp v. Export-Import Bank of Malaysia Berhad* [2014] 1 LNS 186 to prop up his argument that the contents of Part A documents must be taken to be the truth without formal proof. Learned counsel relied on the following two paragraphs of the judgment:

> 32. Moreover, the Reminder Notices, Letters of Demand to KNEC, Termination Notice and Letters of Demand to Guarantor were included in Bundle B1. i.e. **Part A of the Common Agreed Documents where both the authenticity of the documents and the truth of the contents are admitted**.
>
> 33. By agreeing to include these documents in Part A, KNEC and the Other Defendants are deemed to have admitted their liability for breach of the terms of the Facility Agreement, Personal Guarantee and Corporate Guarantee respectively, and also to the amount owing in respect of the Loan Facility.
>
> (emphasis added)

[64] Given the view that we take on the evidential status of Part A documents, we do not consider the pronouncement to be a correct statement of the law. With due respect to the learned judge who tried the case, if it was his understanding of the law that the truth of the contents of the documents had been admitted merely by being included in Part A of the BOD, he should not even have proceeded to hold a trial to determine liability as the defendants were, in his own words, "deemed to have admitted liability for breach of the facility agreement, personal guarantee and corporate guarantee respectively, and also the amount owing in respect of the loan facility". All that he needed to do was to proceed with assessment of damages.

Merits Of The Appeal

[65] As for the merits of the defendant's appeal on liability, we must say that he has a mountain to climb as it is clear that his complaint is essentially against findings of fact made by the trial court. It is a principle of great antiquity that an appellate court should be slow to interfere with findings of fact made by the court of first instance to which the law entrusts the primary task of evaluating the evidence presented before it.

[66] The law reports are replete with high authorities for this trite proposition of law. Suffice it if we refer to the decision of the Judicial Committee of the Privy Council in *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; [1978] 2 MLJ 41, a case emanating from Malaysia where Lord Fraser of Tullybelton delivering the judgment of the Privy Council quoted with approval the following passage in the judgment of Viscount Sankey LC in *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243:

> What then should be the attitude of the Court of Appeal towards the judgment arrived at in the court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing court. There are different meanings to be attached to the word 'rehearing'. For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. *On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way*. Where there is a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see *Clarke v. Edinburgh Tramways Co.* per Lord Shaw, 1919 S.C. (H.L.) 35, 36, where he says:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? *In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put to himself, as I do now in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.*
>
> (emphasis added)

[67] We quote the above passage *in extenso* if only to remind ourselves of the correct approach when dealing with an appeal of this nature. With these principles in mind, we have studied the notes of evidence and the grounds of judgment carefully and we do not find any appealable error on the part of the learned JC that warrants appellate intervention. On the defence of justification, the learned JC had made a firm finding of fact that the defendant failed to establish the defence by failing to prove the truth of the defamatory statements. On the evidence before her, she was perfectly entitled to come to that finding of fact. Our duty in the circumstances is to defer to her judgment.

[68] In any event the learned JC could not have found the defence of justification to have been proved as the plaintiff's testimony in answer to the defendant's allegations was not challenged at all in cross-examination and is therefore deemed to be admitted: *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639. The following is but one of the unchallenged parts of the evidence led by the plaintiff:

> The above is untrue and all the allegations are merely baseless allegations made without evidence. The allegations were made merely to poison the minds of the unit owners and voters for the purpose of gaining their support at the re-election which was to be held on 19.10.2008.

A The Defendant has recklessly and maliciously accused Melawangi of being incompetent, untrustworthy and dishonest in managing Amcorp Trade Centre thereby resulting in "the deficit which grew by leaps and bounds" after Melawangi took over as Manager.

[69] The duty of cross-examining counsel has been explained by the B learned authors of *Sarkar on Evidence*, vol. 2, 14th edn in the following terms at p. 2006:

> The skilful cross-examiner must hear the statements in examination-in-chief with attention, and when his turn comes, he should interrogate the witness on all material points that go against him. If he omits or ignores C them, they may be taken as an acceptance of the truth of that part of the witness's evidence. Generally speaking, when cross-examining, a party's counsel put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which he had a share. Thus, if a witness speaks about a conversation, the cross-examining lawyer must indicate by his examination how much of the witness's D version of it he accepts and how much he disputes, and to suggest his own version. If he asks no question, he will be taken to accept the witness's account (*Flanagan v. Fahy*, 1918, 21R 361,388-89 CA) … Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It E is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice (*Carapiet v. Derderian*, A 1961 C 359).

[70] Learned counsel for the defendant was persistent in his argument that since the defamatory statements had been agreed to be the truth by virtue of being included in Part A of the BOD, the defendant had thus proved his F defence of justification. In the face of the trial court's finding that the truth of the defamatory statements had not been proved and in the light of our opinion on the status of such documents, the argument is futile and must be rejected.

G **[71]** As for the defence of qualified privilege, the House of Lords in *Reynolds v. Times Newspaper Ltd* [2001] 2 AC 127 laid down two conditions before the defence could prevail, namely:

(a) that the publication concerned a matter of public interest; and

(b) that the steps taken to gather, verify and publish the information were H responsible and fair.

[72] In *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 8 CLJ 477 the Federal Court held that the *Reynolds* privilege defence is available to individuals and not only to the press and the broadcasting media. This is how Azahar Mohamed FCJ delivering the judgment of the court I succinctly put it at p. 489:

> In our view, the public interest defence should by no means be synonymous with journalists or media publications. On the ground of public interest, there is sufficient basis it should be in the same way

> extended to anyone who publishes or discloses material of public interest in any medium to assist the public to better comprehend and make an informed decision on matters of public interest that affect their lives.

[73] It was argued that the defence of qualified privilege was available to the defendant as he had a duty to publish the defamatory statements to the intended recipients and that the intended recipients had a corresponding interest to receive the statements. The argument had been duly considered by the learned JC and she rejected it on the ground that whatever was published in the defamatory documents were essentially the internal affairs of the Joint Management Committee of Amcorp Trade Centre and the plaintiff and was of no concern to the public. We do not see anything perverse with that reasoning.

[74] The learned JC also found that the defendant failed to prove that he had taken care, responsibility and prudence to verify the false accusations that he made against the plaintiff. Likewise we find nothing perverse with this finding as it was based on actual evidence before her, or rather the lack of it by the defendant's failure to discharge his burden of proof.

[75] The defence of qualified privilege would still avail the defendant if he had made the defamatory statements honestly and without malice, that is by some indirect and dishonest motive: See *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2. In this regard, the defendant's defence fell flat to the ground as the learned JC found that his motive in making and publishing the defamatory statements was "entirely doubtful". This is how she expressed her doubts:

> [78] However, in the present case, this Court is entirely doubtful as to the inherent motive behind the Defendants Defamatory conduct to be valorous act with the interest of the public solely in heart and mind of the Defendant. As found earlier, it is more probable than not that all the publication of the Defamatory Documents were instead nothing more than the venting of frustration of a disgruntled unsuccessful candidate who was not voted to become a member of the JMC of which the Defendant is clearly desperate to become.

[76] For all the reasons aforesaid, we find that the High Court was plainly right in finding liability to have been established against the defendant on the balance of probabilities. Accordingly we dismiss the appellant's appeal on liability and affirm the learned JC's decision.

Damages

[77] We shall now deal with the issue of damages. We have reminded ourselves that the award of damages is always an exercise of discretion. On the correct approach to deal with an exercise of discretion by a lower court, we take guidance from what Lord Guest said in delivering the judgment of the Privy Council in *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 31 MLJ 228 at p. 229:

A The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v. Johnston* per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been
B a miscarriage of justice (*Evans v. Bartlam*).

[78] Libel is actionable *per se*, that is to say, there is no need to prove actual damage for "the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation": *Gatley on Libel And Slander*, 10th edn at p. 983.
C

[79] A company cannot have feelings but it has a reputation to protect. In the present case, there is no dispute that the plaintiff is a prominent corporate conglomerate in Malaysia, namely Amcorp Group Berhad and is the main shareholder in numerous Bursa listed companies such as AMMB Holdings
D Sdn Bhd, ECM Libra Financial Group Berhad, RCE Capital Berhad and Amcorp Properties Berhad.

[80] The reason why the learned JC awarded the sum of RM5 million in damages to the plaintiff is explained in para. 91 of her grounds of judgment, as follows:

E [91] In the present case, the Plaintiff had specifically pleaded general damages in the sum of RM5 million. It must be noted that the Defendant had never at any point of time challenged the RM5 million claim put forth by the Plaintiff in its Amended Statement of Claim. Even during the trial, the Defendant has never questioned the Plaintiff with regard to the
F amount of general damages claimed the Plaintiff. Having no benefit of the Defendant's contention, challenge and evidence on quantum, this Court is left with no alternative but to allow the Plaintiff's claim to its full extent as the Plaintiff has on their part contended on its reputation and the damage inflicted on its reputation by the Defendant's defamatory conducts.

G **[81]** With due respect to the learned JC, it was wrong for her to hold that since there was no challenge to the RM5 million claim as pleaded in the amended statement of claim, she had no alternative but to allow the full extent of the plaintiff's claim. Regardless of the amount claimed by the plaintiff, the court in a defamation suit is duty bound to consider all relevant
H factors in determining what is the fair and appropriate amount to be awarded as compensation for the wrong done to the plaintiff.

[82] There is no magic formula for this but what the court has to do is to strike a balance between the extent of damage done to the reputation of the party being defamed and the motivation that drove the defamer to publish
I the libel.

[83] The learned JC said that the defendant never at any point of time challenged the RM5 million claim. That is incorrect. The defendant had by para. 12 of the amended defence denied the relevant paragraphs in the amended statement of claim relating to the alleged damage caused by the defamation. More importantly, the plaintiff has not provided compelling basis, evidential or otherwise, to justify its claim that the damage to its reputation was to the tune of RM5 million.

[84] On the proved facts, it is clear that the publication was limited to the Joint Management Committee who numbered only 13 members and to owners of the Amcorp Trade Centre. In *Arul Chandran v. Chew Chin Aik Victor* JP 2000 SGHC 111 it was held that the limited size of the circulation in question would be relevant in the assessment of damages.

[85] The plaintiff alleged that the defamatory statements were also published to other parties but this was denied by the defendant and the plaintiff produced no evidence to substantiate the allegation. All these are relevant factors that the learned JC should have taken into account but failed to, thus rendering her award defective and liable to be set aside.

[86] In the result we allow the appeal on quantum. The award of RM5 million ordered by the High Court is set aside and in substitution thereof we order for a global sum of RM50,000 to be awarded to the plaintiff as damages. In our view, this amount would be more than sufficient compensation for the damage done to the plaintiff's reputation by the publication of the defamatory statements by the defendant. We shall now hear arguments on costs.